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IN THE
Supreme Court of the United States

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Petitioners,

v.

AMERICAN TRUCKING ASSOCIATION, INC., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN RESPONSE FOR RESPONDENTS NATIONAL STONE ASSOCIATION AND KENNECOTT HOLDINGS CORPORATION, *ET AL.*

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PARTIES TO THE PROCEEDINGS

This Brief is filed on behalf of Respondents National Stone Association, Kennecott Holdings Corporation, Kennecott Energy and Coal Company and Kennecott Services Company. These Respondents were Petitioners in the consolidated cases addressed by the Petitions for a Writ of Certiorari to which this Brief responds, *American Trucking Ass'ns, Inc. v. United States Environmental Protection Agency*, D.C. Cir. No. 97-1440 (and consolidated cases). A complete list of the other parties to the proceedings below is provided in the Brief in Response for the Respondents Appalachian Power Co., et al.

RULE 29.6 DISCLOSURE STATEMENT

1. Respondent National Stone Association (NSA) is a national trade association representing the interests and concerns of the aggregates industry. NSA has not issued shares or debt securities to the public. NSA includes over 700 member companies, which account for approximately 90% of the annual U.S. production of crushed stone and approximately 70% of U.S. sand and gravel production.

2. Respondents Kennecott Holdings Corporation, Kennecott Energy and Coal Company and Kennecott Services Company have not issued shares or debt securities to the public.

3. Rio Tinto plc, the indirect parent of the Kennecott companies listed above, is a company incorporated under the laws of the United Kingdom, whose shares are publicly traded in the United States in the form of American Depository Receipts. The principal market for Rio Tinto PLC ordinary shares is the London Stock Exchange, with ordinary shares also listed on the Amsterdam, Brussels, Frankfurt, Paris and Swiss Exchanges. Rio Tinto's principal business is mining.

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INTRODUCTION

This Brief responds to the various Petitions for a Writ of Certiorari on portions of the Court of Appeals' decision in *American Trucking Associations, Inc. v. EPA*, 175 F.3d 1027, *modified*, 195 F.3d 4 (D.C. Cir. 1999). These Respondents are interested primarily in the "nondelegation" decision below with respect to the national ambient air quality standards for fine particulate matter (PM-2.5). They concur generally in the Brief filed by Respondents Appalachian Power Co., et al., and join those Respondents in urging the Court to deny certiorari on the "nondelegation" issue and others presented in this case. The purpose of this Brief is to provide the Court with additional legal and factual support for the decision of the Court of Appeals with respect to the fine particle standards.[1]

I. THE FINE PARTICLE RECORD AMPLY SUPPORTS THE "NONDELEGATION" HOLDING

In EPA's Petition, the brief discussions of the basis for the fine particle standards focus exclusively on the agency's decision that the prior standards did not provide adequate protection. EPA Pet. 5, 11. Even that decision was subject to considerable scientific uncertainty, as EPA discussed in the preamble to the final rules.[2] Beyond that,

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[1] In the decision on rehearing below, the Court of Appeals indicated that it would defer to EPA's response to the "nondelegation" holding under this Court's opinion in *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). EPA App. 75a-76a. Respondents note this Court's recent confirmation that under *Chevron*, the first inquiry is whether Congress has spoken to the question at issue; if so, the court must effect the unambiguous intent of Congress. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. —— (2000). As discussed below, Congress has expressed its intent unambiguously in this case; EPA simply failed to follow it.

[2] *See* 62 Fed. Reg. 38,655-657 (1997). The agency's scientific advisers found that the relevant studies "provide ample reason to be concerned," but also urged that the studies "should be interpreted cautiously" as a result of the various uncertainties (62 Fed.

however, the effect of the scientific uncertainties was greatly magnified in the subsequent decision as to the level at which the new standards would be set. At that point, it was simply not possible to choose the concentration levels based on the science alone. Faced with widespread scientific uncertainty, EPA not only failed to articulate an intelligible principle to govern its decision, but expressly rejected the principle that Congress intended to be applied.

EPA's discussion of the concentration levels for the fine particle standards is a remarkable combination of rejected options and conclusory explanations for the chosen approach.[3] In attempting to justify the chosen standards, EPA stated that the agency:

- sought "the requisite reduction of risk;"
- made "decisions on standard levels that would reduce risk sufficiently to protect public health with an adequate margin of safety;"
- adopted a "balanced view of the strengths and uncertainties of the scientific information that reflects the intermediate approach;"
- "accurately reflected the bases for divergent views;"
- rejected fine particle protection equivalent to the prior PM-10 protection;

Reg. 38,656, col. 3). Accordingly, the Administration delayed implementation until after the first five-year review of the standards, in the hope that pending research would provide some answers. *See* 62 Fed. Reg. 38,421 (1997) (Presidential Memorandum). Congress ultimately ratified the President's decision. *See* Pub. L. 105-178, 112 Stat. 463 (1990), ICP App. 66a. Thus, EPA's assertion that the decision below "unnecessarily prolongs the exposure of millions of Americans to unhealthy pollutant levels" seems somewhat disingenuous. EPA Pet. 11.

[3] The following bullets and quotations are taken from the agency's discussion of the concentration levels at 62 Fed. Reg. 38,674-677 (1997).

- rejected "uncertain ratios" to the prior PM-10 standards;
- opted for "appropriately protective" standards;
- acknowledged great "scientific uncertainties" in the available health studies;
- considered the combined effects of the annual and 24-hour standards, the cumulative scientific uncertainties, the levels recommended by EPA staff and the science advisors, and public comments.

Yet nowhere, throughout this entire lengthy and complex explanation, is there *any* discussion whatsoever of the level of "risk reduction" that is "requisite," the level of protection that is "appropriate" or the criteria to be used in making these decisions in the face of extremely uncertain health studies.

There was no consensus among the agency's science advisors on these questions, given "the many unanswered questions and uncertainties . . ." [4] The scientific data gaps also were demonstrated clearly in the agency's unsuccessful attempts to prepare a reliable quantitative risk assessment for the standards. When entered into various risk assessment models, the data available from the underlying health studies were simply not sufficient to support a robust and reasonably reliable estimate of the risk reduction—if any—that the new standards would provide.[5] As a computer data analyst might say, "garbage in, garbage

[4] Letter from Dr. George T. Wolff, Chair, Clean Air Scientific Advisory Committee, to Hon. Carol M. Browner (June 18, 1996), PMJA 3167.

[5] For a detailed discussion of the uncertainties inherent in the risk assessment, see Abt Associates, "A Particulate Matter Risk Analysis for Philadelphia and Los Angeles," prepared for U.S. EPA, OAQPS, pp. 129-136 (July 3, 1996). EPA Docket No. A-95-54, R.Doc.II-A-11.

out." In the final analysis, EPA did not place "great weight" on the various risk assessments, concluding that they "include significant uncertainty and, therefore, should not be viewed as demonstrated health impacts." [6] Leaving no doubt as to the minimal role of risk assessment in EPA's decision, EPA's Opening Brief in the Court of Appeals stated:

> [T]he risk assessment was not a "central justification" of the PM-2.5 levels . . . Indeed, EPA cautioned against using the risk assessment in this case as a precise measure of risk due to the limitations and uncertainties in the current state of the evidence. Thus, the risk assessment was not "central" to EPA's quantitative task of selecting the PM-2.5 levels.[7]

Denied the essential tool of a reliable risk assessment, EPA simply gazed into its crystal ball and picked a number somewhere in between the various diverging views.

This is precisely the approach to ambient standards that Congress and the courts have sought to prevent. In amending the standard-setting provisions in the Clean Air Act in 1977, Congress intended for EPA to assess risk, but also cautioned:

> [o]n the other hand, the committee does not intend this language as a license for "crystal ball" speculation. The Administrator's judgment must of course, remain subject to restraints of reasoned decisionmaking.[8]

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[6] 63 Fed. Reg. 38,665 (col. 1), 38,656 (col. 2) (1997).

[7] Brief for Respondent United States Environmental Protection Agency at 75, *American Trucking Associations, Inc. v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999) (No. 97-1440 and consolidated cases) (filed August 5, 1998).

[8] H.R. Rep. No. 294, 95th Cong., 1st Sess. 51 (1977) (hereinafter "1977 Houe Rept."). The approach adopted by the House Committee eventually was accepted in conference and written into the Act. *See* H.R. Rep. 564, 95th Cong., 1st Sess. 184 (1977) (Conference Report); *see also Kennecott Copper Corp. v. EPA*, 462 F.2d 846, 850 (D.C. Cir. 1972) (remanding sulfur oxides secondary standard "for the Administrator to . . . enlighten the court as to the basis on which he reached the . . . standard from the material in the Criteria"); *accord, NRDC v. EPA*, 902 F.2d 962, 968, 971 (D.C. Cir. 1990) (court obligated to "carefully review the record to ascertain that the agency has made a reasoned decision based on reasonable extrapolations from some reliable evidence"); *Lead Industries Association v. EPA*, 647 F.2d 1130, 1146-47 (D.C. Cir. 1980) (factual conclusions capable of being drawn from the evidence in the record must be supported by "substantial evidence in the record considered as a whole"; where scientific knowledge insufficient to permit fully informed factual determinations, court "will indeed scrutinize such judgments carefully" and EPA must provide a reasoned explanation "calculated to negate the dangers of arbitrariness and irrationality"); *American Petroleum Inst. v. Costle*, 665 F.2d 1176, 1187 (D.C. Cir. 1981) (same).

As a check on EPA's authority to adopt standards in the face of scientific uncertainty, Congress required the agency to demonstrate that standards are necessary to protect against significant public health risks. The House Committee expressly endorsed the opinion in *Ethyl Corp. v. EPA*, 541 F.2d 1, 13 (D.C. Cir. 1976), which holds that EPA may set standards only when necessary to prevent "a significant risk of harm." [9] In several places, the House Report makes it clear that standards are to address only "significant risk," not *any* risk.[10]

Further, this Court has indicated that the inability to justify public health regulation through scientifically sound quantitative risk assessment poses serious constitutional problems. In *Industrial Union Dept., AFL-CIO v. American Petroleum Institute*, 448 U.S. 607 (1980) ("*Benzene*"), the Court rejected an OSHA attempt to establish a health standard for benzene without demonstrating that

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[9] *See* 1977 House Rept. at 43.

[10] See, e.g., 1977 House Rept. at 43, 45, 46, 47, 48.

the standard was necessary to protect against "a significant risk of harm" (448 U.S at 645). The Court noted that in the absence of a clear statutory mandate, it is unreasonable to assume that Congress intended to grant OSHA the "unprecedented power over American industry" conferred by regulation in the absence of a requirement to demonstrate significant risk (*id.*) The court also explained that "the Government's theory would give OSHA power to impose enormous costs that might produce little, if any, discernible benefit" (448 U.S. at 645). The Court then stated:

> [i]f the Government was correct in arguing that neither [applicable statute] requires that the risk from a toxic substance be quantified sufficiently to enable the Secretary to characterize it as significant in an understandable way, the statute would make such a "sweeping delegation of legislative power" that it might be unconstitutional under the Court's reasoning in *A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495, and *Panama Refining Co. v. Ryan*, 293 U.S. 388. A construction of the statute that avoids this kind of open-ended grant should certainly be avoided (448 U.S. at 646).

This case presents precisely the same scenario. Key scientific uncertainties made it impossible to quantify potential risk sufficiently to characterize it as significant for purposes of choosing the fine particle concentration limits. As a result, EPA was forced to abandon the "intelligible principle" of regulation based on significant risk, resorting to an arbitrary selection of standards from among widely divergent scientific views. No criteria for choosing a standard in the face of this scientific uncertainty were articulated, nor was any other rational basis provided for the numbers that EPA picked. In a reaction similar to this Court's decision in *Benzene*, the Court of Appeals found EPA's approach so arbitrary as to render

the underlying delegation of legislative authority unconstitutional. The court's holding is amply supported by the fine particle record. It is also fully consistent with the governing statute and the relevant decisions of this Court, for reasons to which we now turn.

II. THE "NONDELEGATION" HOLDING IS SUPPORTED BY THE GOVERNING STATUTE AND THE DECISIONS OF THIS COURT

EPA argues that the decision of the Court of Appeals "would unjustifiably expand the role of the courts in reviewing agency action," and "would effectively supplant the concept that courts review agency determinations based on an arbitrary and capricious standard." EPA Pet. 9, 17. But these arguments focus on only one part of the applicable standard of review. Clean Air Act Section 307(d)(9) (42 U.S.C. § 7607(d)(9)), which governs judicial review in this case, provides:

> In the case of review of any action of the Administrator to which this subsection applies, the court may reverse any such action found to be:
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) *contrary to constitutional right, power, privilege or immunity*;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or
>
> (D) without observance of procedure required by law . . . (emphasis added).

Far from assuming an unjustifiably expanded role, the court was fulfilling exactly the role that Congress intended.[11] In the view of these Respondents, the rule-

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[11] In adopting the 1977 standard-setting amendments, Congress was careful "to provide for adequate judicial review of the reasonableness of the Administrator's judgment in assessing risks,"

making record would have supported a remand of the fine particle standards under any of at least the first three provisions of this standard. The fact that the court chose to base its holding on constitutional grounds simply underscores the extremely arbitrary nature of EPA's decision.

Nor is there any basis for EPA's assertions that the court's ruling conflicts with this Court's nondelegation decisions. As discussed above, the court's ruling is fully consistent with this Court's decision in *Benzene*.[12] Further, EPA's argument that the starting point for a nondelegation analysis should be the statutory language, purpose and history is precisely the point. EPA Pet. 12. As this Court has noted, agencies are to "derive meaningful content" from these factors, which provide "a veritable code of rules . . . for the [agency] to follow in giving effect to [the statute]. *American Power & Light Co. v. SEC*, 329 U.S. 90, 104-05 (1946). Judicial review "safeguards against statutory or constitutional excesses," and "all that can be required is that the [agency's] actions conform to the statutory language and policy" (329 U.S. at 106). But where—as here—the agency expressly rejects the "intelligible principle" provided by Congress to govern its decision, and fails to provide a reasonable explanation of how it applied the statute and the underlying policy to derive the standards it chose, the effect is to create an

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in the form of the judicial review provision in Section 307(d). 1977 House Rept. at 50. The same statutory language appears in the judicial review provision of the Administrative Procedure Act. *See* 5 U.S.C. § 706(2) (1999). Indeed, the "arbitrary and capricious" standard itself finds its roots in the Due Process Clause. *See, e.g., Nebbia v. New York*, 291 U.S. 502, 525 (1934).

[12] *See Mistretta v. United States*, 488 U.S. 361, 373 n.7 (1989) (citing *Benzene*) (cases since the Depression confined to "giving narrow interpretations to statutory delegations that might otherwise be thought to be unconstitutional").

unconstitutional delegation. That is all the Court of Appeals held in this case, and its holding is amply justified by the fine particle record and the applicable legal principles expressed by this Court.

CONCLUSION

Congress directed EPA to base ambient air quality standards on significant public health risks. This Court has held that in such cases, the inability to quantify potential risk sufficiently to characterize it as significant raises serious constitutional concerns under the "nondelegation" doctrine. Unable to quantify potential risk owing to severe scientific deficiencies, EPA chose to reject these principles and establish fine particle standards without articulating any other governing criterion. The Court of Appeals found EPA's approach so arbitrary as to effect an unconstitutional delegation of legislative authority. The court's decision is entirely consistent with the record in decisions of this Court. The Petitions for a Writ of Certiorari should be denied.

Respectfully submitted,

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